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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF SANTA CLARA

14 SAN JOSE POLICE OFFICERS'
15 ASSOCIATION,

16 Plaintiff,

17 v.

18 CITY OF SAN JOSE, BOARD OF
19 ADMINISTRATION FOR POLICE
20 AND FIRE DEPARTMENT
21 RETIREMENT PLAN OF CITY OF
22 SAN JOSE, and DOES 1-10, inclusive,

23 Defendants.

No. 1-12-CV-225926
(and Consolidated Actions
1-12-CV-225928, 1-12-CV-226570,
1-12-CV-226574, 1-12-CV-227864,
and 1-12-CV-233660)

**PLAINTIFF AND CROSS-DEFENDANT SAN
JOSE POLICE OFFICERS' ASSOCIATION'S
TRIAL BRIEF**

Date: July 22, 2013
Time: 8:45 a.m.
Place: Dept. 2
Judge: Hon. Patricia Lucas

24 AND RELATED CROSS-COMPLAINT
25 AND CONSOLIDATED ACTIONS

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INTRODUCTION

This case is essentially about whether the vested pension and other retirement rights of Police Officers, represented by plaintiff San Jose Police Officers' Association ("SJPOA"), may be legislated away by Measure B, a voter-approved ballot initiative proposed to the voters by Defendant City of San Jose ("City").¹ The evidence in this case will unmistakably show that Measure B violates Police Officers' pension rights, which are protected by the California Constitution and the parties' collective bargaining agreement ("memorandum of agreement" or "MOA").

Measure B worked a number of detrimental changes to Police Officers' pension rights, such as:

- Sections 1506-A and 1507-A gave them the Hobson's choice of standing on their existing pension and contract rights or "voluntarily" opting into a plan with lesser benefits; both sections threaten Officers with a reduction in their contractual salaries of up to 16% to pay for unfunded accrued actuarial liabilities ("UAAL");
- Section 1509-A eviscerates disability retirement;
- Section 1510-A purports to give the City unilateral authority to deny cost of living adjustments ("COLA") to retirees;
- Section 1511-A abolishes the Supplemental Retiree Benefits Reserve;
- Section 1512-A violates contract provisions capping increases to retiree healthcare contributions.

Further, the evidence will also show the City gravely overreached with Measure B because it also: attempted to silence Police Officers' right to bring this suit by threatening them with pay reductions if they are successful; violated the separation of powers doctrine by arrogating to the City the remedy to be imposed if Police Officers are

¹ SJPOA sued defendant Board of Administration for Police and Fire Department Retirement Plan of the City of San Jose ("P&F Retirement Board" or "Board") solely as a necessary and indispensable party. The Board administers the retirement plan, but has no authority over any changes to its terms. SJPOA seeks no direct relief against the Board.

1 successful; and divides the constitutionally-based fiduciary duties of the P&F Retirement
2 Board to beneficiaries.

3 Decades of case law have limited the discretion that a government employer,
4 like the City of San Jose, has over the pension rights of its employees once they vest.
5 Because the City has no cognizable justification for violating these rights, particularly
6 because it has never argued the pension system is insolvent or that employees received
7 comparable advantages to offset these detriments, SJPOA is entitled to prevail on its
8 claims. For the same reason, SJPOA is also entitled to judgment in its favor on the City's
9 federal claims, which merely parrot SJPOA's core constitutional claims.

10 **FACTUAL & PROCEDURAL SUMMARY**

11 SJPOA generally sets forth the facts in relation to each of its causes of action
12 below, but provides some background information in this section.

13 SJPOA is a union representing Police Officers working for the City of San
14 Jose. (Ex. POA16, POA30 [Memoranda of Agreement, 2004-2008, 2010-2012].) It filed
15 this action on behalf of its members on June 6, 2012 after the voters enacted Measure B,
16 an initiative placed on the ballot by the City of San Jose. (Ex. POA42, ¶ 1 [SJPOA's First
17 Amended Complaint ["FAC"].) SJPOA asserted Measure B violated Police Officers'
18 vested pension rights created by the San Jose Charter ("Charter") and the San Jose
19 Municipal Code ("SJMC"), and that it violated certain rights under its collective
20 bargaining agreement ("memorandum of agreement" or "MOA"). (*Id.* ¶ 2.)

21 The Charter obligates the City to establish and maintain a retirement plan for
22 its employees. (Ex. POA1 [Charter Section 1500].) The Charter mandates certain
23 minimum retirement benefits for Police Officers, and expressly authorizes the City
24 Council to grant additional or greater benefits through the SJMC. (*Id.* [Charter Section
25 1500 ("the Council shall provide, by ordinance or ordinances, for the creation,
26 establishment and maintenance of a retirement plan"), Section 1504 (minimum benefits),
27 Section 1504(e) ("The benefits hereinabove specified are minimum only; and the Council,
28 in its discretion, may grant greater or additional benefits")].) Accordingly, the SJMC

1 generally details Police Officers' pension benefits and rights in Chapter 3.36, the 1961
2 Police and Fire Department Retirement Plan ("P&F Retirement Plan"). (Ex. POA49.)
3 The P&F Retirement Plan is administered by the Board of Administration of the Police
4 and Fire Department Retirement Plan ("Retirement Board"). (SJMC 3.36.510 ["The
5 retirement board shall have the exclusive control of the administration and investment of
6 the retirement fund."].) The Retirement Board establishes contribution rates on an
7 actuarial basis—i.e., to keep the P&F Retirement Plan actuarially sound. (SJMC
8 3.36.1520, 3.36.1550.) The City Council and Mayor have no discretion over employee
9 contribution rates paid into the P&F Retirement Plan. (See *id.*)

10 Retirement benefits are granted as a form of deferred compensation and
11 inducement to future service with the City. The structure of the P&F Retirement Plan has
12 a back-loaded incentive (through higher accrual rates) for Police Officers to work with the
13 City for more than twenty years. (Exs. POA58 [Measure B]; POA46; POA38; POA47.)
14 Police Officers and the City pay into the P&F Retirement Plan to fund it, as specified in
15 the funding provisions of the Charter and the SJMC. (Ex. POA49, [SJMC 3.36.1520,
16 3.36.1525, 3.36.575].)

17 In 2011, the City began a campaign to reduce all City employees' pension
18 benefits, including those of Police Officers, by threatening to declare a fiscal emergency
19 and by sponsoring a voter ballot initiative, Measure B, to attack pension rights.² In
20 December 2011, however, just before the City's fiscal emergency declaration was to be
21 voted on, the independent actuary for the P&F Retirement Plan issued a report with
22 updated projections for the City's retirement costs showing the City's retirement
23

24 ² The City's mayor made repeated—and inaccurate—public assertions that, by Fiscal
25 Year ("FY") 2015-16, the City's retirement contribution costs would reach \$650 million
26 per year. After Measure B was enacted, the California State Auditor determined the
27 City's retirement cost projections were "unsupported and likely overstated." (Ex. POA44,
28 p. 1 [the City "referred to a projection that the city's annual retirement costs could
increase to \$650 million by fiscal year 2015-16, a projection that our actuarial consultant
determined was unsupported and likely overstated"].) In December 2011, the Retirement
Plan's actuary estimated that FY 2015-16 costs would be approximately \$320 million for
both the P&F Retirement Plan and the Federated Plan. (*Id.*)

1 contributions just for Fiscal Year 2012-13 would actually be \$55 million *less than*
2 previously budgeted by the City. The Mayor immediately withdrew his fiscal emergency
3 proposal but nonetheless the City Council placed Measure B on the ballot for voter
4 approval. (Exs. POA35-POA36; POA61.) Measure B was enacted by San Jose's voters
5 on June 5, 2012. (Ex. POA 43.)

6 One important historical precedent bears noting: The mayor did not
7 acknowledge that the City's projected retirement contribution increases were partly rooted
8 in the City's unilateral decision to reduce its pension contributions by \$80 million when
9 the P&F Retirement Plan had an actuarial surplus in fiscal years 1993 through 2004.³ The
10 Retirement Board later concluded in 2011 that this subsequently increased the P&F
11 Retirement Plan's unfunded liability by approximately 44%. (Exs. POA7, POA11,
12 POA12, POA31.) Employee contributions were not similarly reduced during the actuarial
13 surplus years. (*See id.*)

14 Measure B purports to change Police Officers' pension rights going forward.
15 (Ex. POA58 [Measure B, Section 1502-A].) In reality, however, the City is seeking to
16 saddle Police Officers with responsibility for paying unfunded liabilities that accrued
17 *before* Measure B was enacted, and more generally to divest them of their right to
18 continue in the pension system they are vested in.

19 Measure B further provides that it "Supersedes all Conflicting Provisions,"
20 including other Charter and SJMC sections. (*Id.*, Section 1503-A.) The City has
21 implemented at least two significant provisions of Measure B, including abolishing the
22 SRBR and changing the healthcare premiums it pays for retired Police Officers to the
23 lowest cost plan available to all City employees (rather than the lowest cost plan available
24 to active Police Officers). Other sections challenged in the instant action remain stayed,
25 by stipulation, until January 1, 2014.

26
27 ³ An actuarial surplus exists when a retirement system has more assets than its total
28 expected liabilities. The P&F Retirement System experienced large surpluses in the late
1990s and early 2000s. (See Ex. POA12.)

1 The City filed two motions for judgment on the pleadings against SJPOA in
2 late 2012 and early 2013, seeking judgment as a matter of law on numerous sections of
3 Measure B. Judge Kirwan in Department 8 rejected most of the City's arguments, but did
4 dismiss SJPOA's MMBA claim with prejudice.

5 The City subsequently filed a motion for summary adjudication in February
6 2013, principally arguing that SJPOA and the other unions had no vested rights. In its
7 June 21, 2013 Order, this Court rejected the City's arguments as a matter of law and
8 denied the motion in full. (Ex. POA51 [6/21/13 MSA Order].) It observed that "the
9 ultimate question is one of law" (MSA Order at 4:9-10) and ruled that (1) "the existence
10 of [Charter Sections 1500 and 1503] alone do[] not preclude the creation of vested rights"
11 (at 4:19-20); (2) "it appears that it is the obligation of the City to make up unfunded
12 actuarially accrued liabilities ('UAAL')" (at 5:7-8); and (3) that "the plain language of the
13 [SJMC] makes distributions mandatory" for the SRBR and that "[i]f there was an intent
14 that SRBR cease distributions in the face of [UAAL], it is not apparent from the face of
15 the Charter or [SJMC]" (at 6:16, 6:23-25).⁴

16 ARGUMENT

17 I. THE SAN JOSE CHARTER AND SJMC CREATED VESTED PROPERTY RIGHTS 18 PROTECTED BY THE CALIFORNIA CONSTITUTION; MEASURE B UNLAWFULLY IMPAIRS THOSE RIGHTS

19 Under settled California law,⁵ public employee pension benefits are deferred
20 compensation and thus a form of property protected by the California Constitution. (Cal.

21
22 ⁴ The Court also ruled against the City on retiree healthcare, because the issue on which it
23 sought summary adjudication—payment of retiree healthcare UAAL—was not at issue in
the pleadings. (See Ex. POA51 [MSA Order at 5:14-28].)

24 ⁵ The City will likely rely on federal cases with an unduly narrow construction of
25 California's vested rights doctrine. Those cases do not control here. California law is
26 intentionally more protective of public employee pension rights than is federal law. The
27 California Supreme Court has held that "California law places earned pension rights of
28 public officers and employees under the protection of the contract clause regardless of any
characterization adopted by the federal courts." (*Eu, supra*, 54 Cal.3d at 534 [italics
original, quoting *Lyon v. Flourney* (1969) 271 Cal.App.2d 774, 781; *Walsh v. Board of
Administration* (1992) 4 Cal.App.4th 682, 697-698 [comparing state and federal law and
concluding "under California law there is a strong preference for construing governmental
pension laws as creating contractual rights for the payment of benefits"].)

1 Const. art I, § 9 [Contracts Clause].) Charters and municipal codes are valid and
2 enforceable sources of vested property rights. (See *International Assn. of Firefighters v.*
3 *San Diego* (1983) 34 Cal.3d 292, 302 (“IAF”) [charter, ordinances, and municipal codes];
4 *Retired Employees Association of Orange County, Inc. v. County of Orange* (2011) 52
5 Cal.4th 1171, 1194 (“*REAOC*”) [ordinances].)

6 To prevail on its Contracts Clause claim, SJPOA will show evidence of the
7 existence of a vested right and substantial impairment by the City. Because “there are
8 strict limitations on the conditions which may modify the pension system in effect during
9 employment,” *Legislature v. Eu* (1991) 54 Cal.3d 492, 529, ***the City has the burden*** of
10 showing the impairment was constitutionally reasonable, i.e., the modifications “must
11 bear some material relation to the theory of a pension system and its successful operation,
12 and changes in a pension plan which result in disadvantage to employees should be
13 accompanied by comparable new advantages.” (See *Betts v. Board of Administration*
14 (1978) 21 Cal.3d 859, 864.)

15 “A public employee’s pension constitutes an element of compensation, and a
16 vested contractual right to pension benefits accrues upon acceptance of employment.
17 Such a pension right may not be destroyed, once vested, without impairing a contractual
18 obligation of the employing public entity.” (*Betts, supra*, 21 Cal.3d at p. 863; *Allen v.*
19 *City of Long Beach* (1955) 45 Cal.2d 128, 131; *Kern v. City of Long Beach* (1947) 29
20 Cal.2d 848, 855 [an “employing governmental body may not deny or impair the
21 contingent liability [of pensions] any more than it can refuse to make the salary payments
22 which are immediately due”]); *Carman v. Alvord* (1982) 31 Cal.3d 318, 325; *Frank v.*
23 *Board of Administration* (1976) 56 Cal.App.3d 236, 242.) These rights vest in such a
24 sense that they cannot be destroyed by charter amendment even before the time for
25 retirement has arrived. (*Kern, supra*, 29 Cal.2d at pp. 855-856.)

26 The Charter and SJMC sections that define the P&F Retirement Plan create
27 such vested rights. “Where ... services are rendered under ... a pension statute, the
28 pension provisions become a part of the contemplated compensation for those services,

1 and so in a sense of a part of the contract of employment itself.” (*O’Dea v. Cook* (1917)
2 176 Cal. 659, 661-662.) Accordingly, public employees have the “right to earn future
3 pension benefits through continued service, on terms substantially equivalent to those”
4 existing at the time they began working, or enhanced during their service. (*Legislature v.*
5 *Eu* (1991) 54 Cal.3d 492, 528; *Carman, supra*, 31 Cal.3d at p. 325; *Sweesy v. Los Angeles*
6 *County Peace Officers’ Retirement Board* (1941) 17 Cal.2d 356 [public employees
7 entitled to subsequent benefit increases]; *Kern, supra*, 29 Cal.2d at p. 855 [even though
8 pension right vests upon employment, “the amount, terms and conditions [of] the benefits
9 may be” increased].) The right to pension benefits vests at employment, even if the
10 entitlement to benefits does not fully mature until retirement or disability. (See *Wallace v.*
11 *City of Fresno* (1954) 42 Cal.2d 180, 183.) “[T]he well-recognized rule [is] that all
12 pension laws are liberally construed to carry out their beneficent policy.” (*Bellus v. City*
13 *of Eureka* (1968) 69 Cal.2d 336, 345.)

14 The California Supreme Court re-affirmed these core principles in *Retired*
15 *Employees Association of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th
16 1171 (“*REAOC*”). The City previously asserted that *REAOC* created a presumption
17 against vested rights. But even if true, that is not an onerous burden because *REAOC* held
18 that any such presumption is extinguished “when the statutory language *or* circumstances
19 accompanying its passage clearly evince a legislative intent to create private rights of a
20 contractual nature enforceable against the [government body],” citing a pension case—
21 *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 786—for that formulation. (52 Cal.4th at p.
22 1187 [italics added; quotations omitted].) Indeed, the Supreme Court approvingly relied
23 on another pension case, *California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494,
24 for the proposition that “a legislative intent to grant contractual rights can be implied from
25 a statute if it contains an unambiguous element of exchange of consideration by a private
26 party for consideration offered by the state.” (52 Cal.4th at p. 1186, italics added; *Olson*
27 *v. Cory* (1980) 27 Cal.3d 532, 540 [“a public employee’s pension rights are an integral
28

1 element of compensation”].) This element of exchange (deferred compensation in return
2 for employee labor) is at the core of the vested rights doctrine.

3 The evidence will show that Police Officers’ pension benefits in the Charter
4 and SJMC are a protected property right, and that Measure B substantially infringed on
5 those rights without reasonable justification. The City has never argued it offered any
6 comparable new advantages to offset these detriments, let alone presented any supporting
7 evidence.

8 **A. Sections 1506-A and 1507-A Violate Police Officers’ Vested Pension**
9 **Rights, Including the Right to City Payment of UAAL**

10 Sections 1506-A and 1507-A together mandate an employee salary reduction,
11 effective June 23, 2013, of 4% per year with a 16% maximum deduction to pay for up to
12 half of “any” UAAL. But this Court already correctly ruled that—as a matter of law—“it
13 is the obligation of the City to make up any unfunded actuarially accrued liabilities
14 (‘UAAL’). Defendants have not identified any language that imposes an obligation on
15 employees to pay for unfunded liabilities.” (Ex. POA51 [6/21/13 MSA Order at 5:7-9].)
16 Indeed, the facts show Police Officers have a vested right to City payment of UAAL in
17 the SJMC.

18 **1. The SJMC and Charter Established That Officers Have a**
19 **Vested Right to City Payment of all UAAL**

20 As SJPOA explained in opposing the City’s Motion for Summary
21 Adjudication, the City is *expressly* responsible for all UAAL under the SJMC for the
22 general retirement plan.⁶ *First*, consistent with the Charter, SJMC 3.36.1520 (“Current
23 service contributions”) requires an actuarially sound system (i.e., a fully funded system),
24 but it specifically exempts Police Officers from paying UAAL:

25 *The retirement board shall determine and fix, and from time to time*
26 *it may change, the amount of monthly or biweekly contributions for*
27 *current service which must be required of the City of San José and*
of members of this plan to make and keep this plan and the
retirement system at all times actuarially sound. For the purpose of
this section, ... "contributions for current service" for members

28 ⁶ This argument does not apply to UAAL for retiree healthcare.

1 employed in the police department shall mean the sum of the
2 normal costs for each actively employed member in the police
3 department as determined under the entry age normal actuarial cost
4 method, divided by the aggregate current compensation of such
5 members. *Rates for current service shall not include any amount*
6 *required to make up any deficit resulting from the fact that previous*
7 *rates of contribution made by the city and members were*
8 *inadequate to fund benefits attributable to service rendered by such*
9 *members prior to the date of any change of rates, and shall not*
10 *include any amount required for payment of medical or dental*
11 *insurance benefits.*

12 (Ex. POA49, [SJMC 3.36.1520.A (emphases added)].) Requiring that the City maintain
13 an actuarially sound system while simultaneously exempting Police Officers from paying
14 “any deficit” in the retirement system means the City bound itself to pay for any UAAL.
15 Moreover, only the retirement board, and *not* the City, is authorized to require increases in
16 pension contributions. (*Id.*)

17 *Second*, SJMC 3.36.1550 (“Contributions for prior service benefits”) makes
18 that obligation even more explicit:

19 [E]xcept as provided in Section 3.36.1555, *the City of San José*
20 *shall contribute* to the retirement fund, monthly, *all such amounts*
21 *as the retirement board shall find must be contributed to the fund, to*
22 *make this plan actuarially sound to the extent that such amounts*
23 *are not provided by member and city's current service contributions*
24 *as provided for in Section 3.36.1520.*

25 (Ex. POA49 [SJMC 3.36.1550.D (emphases added)].)⁷ This language is mandatory and
26 expressly binds the City to pay “all such amounts” necessary to “make this plan
27 actuarially sound.” It contemplates no exception or limitation on the City’s obligation to
28 pay all UAAL.

While Section 3.36.1555 does contemplate that employees pay “prior service”
contributions that is *only* in exchange for new “increased benefits”—consistent with the
law on vested pension rights—and even then only in an amount that makes up for past
contributions that *employees* would have paid had that benefit existed previously. (Ex.
POA49 [SJMC 3.36.1555.A-B (emphases added)].) Moreover, Section 3.36.1555 itself

⁷ SJMC 3.36.1550.C contains a substantially similar provision making the City
responsible for UAAL generated by the plan predating the 1961 P&F Retirement Plan.

1 only applies to three specifically identified increases to the formula used to calculate
2 retirement benefits—i.e., those increases granted in SJMC 3.36.805, 3.36.1020.B.3, and
3 Ordinance No. 27721. (*Id.*; Ex. POA19 [Ordinance No. 27721]) The City is required to
4 pay any remaining UAAL. (Ex. POA49 [see SJMC 3.36.1550].)

5 Municipal ordinances can properly “manifest[] an express intent to cover past
6 [UAAL]” and give rise to a vested right. (*Assoc. of Blue Collar Workers v. Wills* (1986)
7 187 Cal.App.3d 780, 789.) *Wills* found that city ordinances substantially similar to SJMC
8 3.36.1520 and 3.36.1550 created such rights (*id.* at p. 792 [“the nature of the vested right
9 has been identified”]), and held that “[t]he right vested in the employees is their
10 reasonable expectation that the city would meet its statutory obligations to finance the
11 unfunded liability for past accumulated debt.” (*Ibid.* [“The employees here lost a right to
12 have the city finance the [UAAL]”; see also fn.2 [Fresno Municipal Code sections 2-1821
13 and 2-1822].) It thus rejected Fresno’s attempt to force employees to pay for UAAL
14 through unilateral payroll deductions because the municipal code expressly made the city
15 responsible for UAAL. (*Id.* at pp. 789, 794 [“Because the pension cases treat the
16 municipal code as a contract between the parties, a violation of the code necessarily
17 becomes a violation of the contracts clause”].)

18 **Third**, SJMC 3.36.1520, 3.36.1550, and 3.36.1555 are fully consistent with the
19 Charter. Charter Section 1504(e) expressly authorizes the City Council to “grant greater
20 or additional benefits” beyond those in the Charter. (Ex. POA58.) And Charter Sections
21 1504(b)-(c) require the retirement system (and any new benefits) be actuarially sound.
22 (*Id.*) Read together these two Charter provisions authorize the City to grant benefits and
23 require it to make sure such benefits are fully funded. SJMC 3.36.1520, 3.36.1550, and
24 3.36.1555 implement these requirements. Thus, while the Charter itself is silent on the
25 allocation of UAAL, it *authorizes* the allocation of all UAAL to the City in the SJMC.

26 **Fourth**, none of these SJMC sections expressly say the City reserves its rights
27 to revoke its payment of all UAAL as to current employees, let alone without granting
28 employees additional benefits.

1 ***Fifth***, these express provisions are buttressed by the legislative history of the
2 pension system and the City's own understanding of its obligation to pay all UAAL. The
3 requirement the SJMC now imposes has existed in various forms since at least 1946; that
4 is, the pension system not only ***currently*** requires the City pay all UAAL but has done so
5 ***historically***.

6 **The 1946 Charter amendments expressly allocated UAAL to the City**,
7 much like the current SJMC. These amendments added Charter Section 78a, sub. (2)(k),
8 which required an actuarially sound system and expressly stated that "*Any actuarial*
9 *deficiency in the fund shall be made up over a period of years by gifts, waivers, donations,*
10 *earnings and contributions by the City.*" (Ex. POA1 [1946 Charter Amendment].)

11 **The 1961 Charter amendments retained this requirement, but permitted**
12 **the City to require contributions from members *only* for UAAL generated by**
13 **increased benefits.** These amendments left Charter Section 78-A untouched, but added
14 Section 78b which authorized the Council to grant new benefits beyond those in the
15 Charter. Section 78b, subd. (2) required that such new benefits or plans be actuarially
16 sound, and it gave the Council discretion to decide how UAAL for such *new* benefits was
17 to be paid: "the Council . . . may in its discretion provide for the payment by the City of
18 San Jose of all such amounts as must be contributed to the retirement fund on account of
19 such prior service benefits to render the plan and fund actuarially sound . . . , or may
20 require contributions for such purposes by both City and members provided that
21 contributions required of members . . . shall never exceed \$3 for each \$8 contributed . . .
22 by the City." (Ex. POA2 [1961 Charter Amendments].) Thus, employees paid UAAL
23 *only* in exchange for increased benefits that are applied to prior service.

24 **The 1965 Charter also required an actuarially sound system, but was**
25 **silent on UAAL allocation, thereby authorizing the City Council to allocate UAAL**
26 **by ordinance.** The 1965 Charter added Section 1504(c)—which is still the version in
27 effect today. (Ex. POA59.) That Charter section required an actuarially sound system,
28 but apparently gave the Council discretion to allocate UAAL. Accordingly, from 1965 to

1 1971 the Retirement Board used an actuarial method that defined “current contributions”
2 to include UAAL generated by the P&F Retirement Plan such that employees and the City
3 paid UAAL during that time period. However, in 1971 the City Council enacted a
4 resolution declaring the Council’s intent to amend the P&F Retirement Plan so that only
5 the City paid UAAL; it also changed the actuarial method employed to reduce volatility in
6 contribution rates. (See Ex. POA3 [Resolution 40129 (“the new rates thereby established
7 by the Board for all such members shall not include any amount required to make up any
8 deficit resulting from the fact that previous rates of contribution thereto . . . were
9 inadequate”)].)

10 The Council formally amended the Retirement Plan in 1979 through Ordinance
11 19690, which enacted the immediate precursors to SJMC 3.36.1520 and 3.36.1550 where
12 the City expressly bound itself to pay for all UAAL. (Ex. POA4 at 2-3 [Ordinance
13 19690].) All current Police Officers were hired after Ordinance 19690 was enacted in
14 1979 which gives rise to the vested right to City payment of UAAL asserted here. (Ex.
15 POA52 at ¶ 13) These facts make clear that except for a brief six-year period before all
16 current Police Officers were hired, employees have had a vested right to City payment of
17 all UAAL.

18 The City gives no cognizable reason why the SJMC cannot itself create that
19 vested right. Indeed, the City understood its obligation to pay all UAAL and used it to
20 justify its allocation of all actuarial gains to itself when the P&F Retirement Plan was
21 overfunded in 1993-2004. It did so consistent with a theory that because it was required
22 to pay all UAAL it was accordingly entitled to take all gains. (Exs. POA7, POA11,
23 POA12.) That underfunding directly contributed to the present UAAL that the City is
24 now trying force employees to pay. (*Id.*)

25 **a. Because Vested Rights Are Not Subject To Collective**
26 **Bargaining, MOA Article 5.1 Does Not Abrogate**
27 **Officers’ Vested Rights to City Payment of UAAL**

28 The City admits that vested rights are not subject to collective bargaining
(MSA at 13-14), consistent with the legal advice from its counsel. (Ex. POA53 [2/7/08

1 Jones Day Memo]). However, it insists that Police Officers “waived” their vested rights
2 to City payment of UAAL by negotiating a one-time agreement to pay increased pension
3 contribution rates in Article 5.1 of the 2010-2011 MOA.⁸ (Ex. POA30.) That argument
4 holds no water.

5 The City has previously been expressly informed that “a collective bargaining
6 unit may not bargain away individual statutory or constitutional rights that ‘flow from
7 sources outside the collective bargaining agreement itself,’ and collective bargaining
8 agreements may not contain provisions that abrogate . . . constitutional rights” such as
9 “pension rights.” (Ex. POA53 [2/7/08 Jones Day Memo at 20-21, esp. fn.55].) That is
10 wholly consistent with California law. (E.g., *San Bernardino Public Employees Assn. v.*
11 *City of Fontana* (1998) 67 Cal.App.4th 1215, 1225 [vested rights may not be bargained
12 away because they are protected by a “statutory source [that] gives the employees
13 additional protection or entitlement to future benefits”].) Officers’ right to City payment
14 of UAAL flows from SJMC 3.36.1520, 3.36.1550, and 3.36.1555 and are thus *not* subject
15 to collective bargaining.

16 Indeed, the evidence will show that Police Officers did *not* pay any UAAL
17 through Article 5.1 and that their additional contributions were paid directly to their
18 individual retirement accounts. The parties’ ultimate agreement was that Police Officers’
19 increased pension contributions were credited to their individual retirement accounts, not
20 to general UAAL. (Ex. POA30.)

21 The City has never persuasively explained how MOA Article 5.1 means no
22 vested rights exist—in fact the Court already rejected that argument in denying the MSA--
23 and none of the cases it has relied on help it. Many of these cases are distinguishable
24 and/or involve non-vested, non-pension benefits that were legitimately subject to
25 bargaining.

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28 ⁸ Unlike some of the other unions, SJPOA did *not* agree its members would make any on-
going contributions. (See Ex. POA30 [MOA Art. 5.1].)

1 The statement in *San Diego v. Haas* (2012) 207 Cal.App.4th 472 that “[v]ested
2 rights may not be implied ... where ... they are contrary to the express terms of the
3 parties’ contract” does not help the City. The right to City payment of UAAL is express,
4 not implied. (Part I.A.1, *supra*.)

5 *CTA v. Parlier Unif. Schl. Dist.* (1984) 157 Cal.App.3d 174 is distinguishable
6 because there the Education Code specifically prohibited waiver through the collective
7 bargaining process of the rights at issue there. (*Id.* at p. 183 [“Education Code section
8 449246 prohibits waiver”].) Police Officers waived no vested right here and, in any
9 event, there is no similar provision here.

10 *San Diego Police Officers Assoc. v. San Diego City Employees’ Retirement*
11 *System* (9th Cir. 2009) 568 F.3d 725 also does not help the City. Plaintiffs there claimed a
12 vested right to the city’s “pickup” of a portion of police officers’ retirement contributions
13 that was purportedly created by the city charter, municipal code, and the parties’ MOA.⁹
14 The court held a prior settlement barred plaintiffs’ claims based on the charter and
15 municipal code. (*Id.* at pp. 735-736.) It further held the MOA was not a source of vested
16 rights because it had *expired*. (*Id.* at pp. 738-39.) These holdings do not apply here. The
17 City does not “pickup” any employee UAAL contributions because the City bound itself
18 to pay for all UAAL. There is no settlement barring this Court from examining the
19 municipal laws giving rise to that vested right, and Police Officers do not claim a vested
20 right arising from an expired MOA. More fundamentally, the *San Diego* court’s finding
21 that the “*historical* practice of negotiating the amount of pickup . . . in lieu of or in
22 conjunction with salary increases” in prior MOAs confirmed that the pickup was “a
23 compensation term, not a [vested] retirement benefit” (*id.* at p. 739) also does not apply.
24 There is no analogous “historical practice” here. By its terms Article 5.1 was a “one-
25 time” agreement. (Ex. POA30.)

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28 ⁹ The city’s “pick up” was *in addition* to its own employer contribution. (*Id.* at p. 730.)

1 *IAF and Pasadena Police Officers Assn. v. City of Pasadena* (1983) 147
2 Cal.App.3d 695 are also inapposite. Those cases found lawful increases in employee
3 contributions rates because the very ordinances at issue allowed such increases. (*IAF*,
4 *supra*, 34 Cal.3d at p. 300; *Pasadena POA*, *supra*, 147 Cal.App.3d at p. 711 [“The
5 employees' contribution was not absolutely fixed but was dependent upon actuarial tables
6 and assumptions, which the board was authorized by the charter to determine and revise
7 from time to time”].) These cases would apply here, e.g., if the Retirement Board
8 increased employee contributions for actuarial necessity. Such an increase would be fully
9 consistent with the SJMC. But *IAF* and *Pasadena POA* do not authorize what Section
10 1506-A tries to do because the SJMC does not allow the City to change unilaterally
11 contribution rates to pay for UAAL. (Ex. POA49 [SJMC 3.36.510, 3.36.1520,
12 3.36.1550].)

13 Finally, the City has relied on numerous SJMC sections purportedly allowing it
14 to saddle Police Officers with UAAL. First, it relies on SJMC 3.36.1525, of which sub.
15 (B) provides that “members . . . shall make such additional retirement contributions for
16 fiscal years 2010-2011 as may be required by executed agreement with a recognized
17 bargaining unit or binding order of arbitration.” But that section was added to validate
18 what the parties mutually agreed to for one year in the MOA outlined above, which was a
19 bilateral agreement.¹⁰ More fundamentally, neither the MOA nor SJMC 3.36.1525
20 expressly state that employees directly pay any UAAL.

21 As to the City’s argument that past ordinances enacted under SJMC 3.36.1555
22 and 3.36.1525 which required employee contributions for UAAL somehow demonstrate
23 no vested right exists fails for the same reasons outlined above. Payment of UAAL *in*
24 *exchange* for increased benefits (i.e., a “new advantage”) does not violate the Contracts
25 Clause or implicate vested rights.

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27 ¹⁰ By its terms, SJMC 3.36.1525.A—a parallel section that does not limit such increases to
28 2010-2011—does not apply to Police Officers. Police Officers are subject to interest
arbitration.

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1 officer or employee incapable of continuing to satisfactorily assume the responsibilities
2 and perform the duties and functions of his or her office or position and of any other
3 office or position *in the same classification of offices or positions* to which the City may
4 offer to transfer him or her” (*Id.*, emphases added.) SJMC 3.36.900 similarly defines
5 “disability” as the inability of an officer to “perform[] the duties of the position then held
6 by him and of any other position in the *same classification* of positions to which the City
7 may offer to transfer him.”¹³ Numerous P&F Retirement Plan documents issued to plan
8 members make the same representation. (Ex.POA50). Further, SJMC 3.36.900
9 authorizes the P&F Retirement Board to determine whether an injured officer is disabled,
10 in consultation with “competent medical opinion.” Disability retirement is a recognized
11 vested right, even before an employee is actually disabled. (See *Frank, supra*, 56
12 Cal.App.3d at p. 243 “[n]o reason exists . . . to apply a different rule to disability
13 retirement benefits than to service retirement benefits”].)

14 Police Officers depend on the promise of disability pensions as they risk their
15 lives protecting the City of San Jose. Measure B works a number of detrimental changes
16 eviscerating that right. First, a Police Officer injured in the line of duty is now not
17 considered disabled if he can “perform any other jobs . . . *in the employee’s department*,”
18 including non-police officer classifications. (Measure B § 1509-A(b)(ii)(2) [emphases
19 added].) Second, an injured officer must also be “incapable of engaging in *any* gainful
20 employment for the City,” presumably meaning an officer is not disabled if he or she can
21 perform any position with the City even outside the police department. (*Id.* at 1509-A(a).)
22 Third, Section 1509-A requires a disability retirement assessment under these new
23 standards even if there are no vacancies into which an injured officer can be placed. (*Id.*)
24 That means that an otherwise-disabled officer can be denied disability retirement if the
25 City determines he or she could fulfill another position even if there are no “positions
26 available at the time a determination is made.” (*Id.*) Further, Section 1509-A does not

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28 ¹³ The MOA similarly defines “disability” in the context of non-retirement disability
leave. (See Ex. POA30 [2011-2013 MOA Section 32.4].)

1 require the City to hire an otherwise-disabled Police Officer, even when a qualifying
2 vacancy is available. (See *id.*, generally.) Finally, Measure B divests the P&F Retirement
3 Board from deciding whether an officer is disabled, and instead gives that authority to a
4 medical panel selected solely by the City. (*Id.* subd., (c).)

5 These changes unlawfully divest Police Officers of their vested right in the
6 disability retirement system they entered into, worked under, and which they have a right
7 to continue to work under. In *Frank v. Board of Administration*, a correctional employee
8 was excluded from the disability retirement system that existed when he was hired
9 because the Legislature amended various statutes and reclassified his position as a non-
10 law enforcement classification before he retired. (56 Cal.App.3d at pp. 238-240.) The
11 court of appeal held that the employee had a vested contractual right to continue in the
12 same retirement system he was hired into. (*Id.* at pp. 241-243.) The court reached that
13 decision because the employee's "reasonable expectations were thwarted" by the
14 subsequent amendment since that meant he "was denied a substantial part of the
15 compensation *already earned* in his employment." (*Id.* at p. 245, italics added.)

16 Police Officers also have a right to continue under the disability retirement
17 system they entered into. In *Newman v. City of Oakland Retirement Board* (1978) 80
18 Cal.App.3d 450, the court refused to apply a change in department policy allowing recall
19 of disabled retired police officers who could perform a "reasonable range of duties"
20 because it was not the same policy the officer was hired under (which allowed disability
21 retirement if an officer could not perform a "full range of duties"). (*Id.* at pp. 453, 462-
22 463.) The court held that despite the recent change in policy, "[i]t was th[e] long
23 established policy . . . that was intended to and did become a part of appellant's pension
24 contract." (*Id.*)

25 Under *Frank* and *Newman*, Section 1509-A cannot be applied to current Police
26 Officers. First, it redefines the qualifications for "disability retirement" in a way that
27 eviscerates the benefit. Previously, an SJPOA member unable to perform the duties of an
28 employee "in the same classification," *i.e.*, the duties of a police officer, would receive a

1 disability retirement. But under Measure B an officer is not deemed disabled unless that
2 officer cannot perform police officer duties *and* (a) cannot perform any other non-peace
3 officer functions within the police department, *and* (b) cannot perform any other City job,
4 even if (c) there are no open positions. Section 1509-A will thus result in the termination
5 and/or forced resignation of Police Officers who would otherwise have qualified for
6 disability retirement, resulting in a complete loss of pension rights. Finally, that
7 determination is now made—not by the P&F Retirement Board as required under
8 SJMC3.36.900—but by a medical panel appointed by the City.

9 The City may argue that Section 1509-A(d) authorizes “matching funds” to
10 pay for disability insurance for injured officers who do not qualify as disabled under
11 Measure B. But that is not a comparable new advantage because employees will have to
12 pay out-of-pocket premiums (which disabled officers do not currently do), the level of
13 benefits will not be the same, and finally because City payment is wholly discretionary.
14 (See *id.*)

15 **C. Section 1510-A Violates Police Officers’ Vested Right to COLA**
16 **Benefits By Authorizing Unilateral Forfeiture**

17 SJMC 3.44.150 obligates the City to pay retired Police Officers’ an annual 3%
18 cost of living adjustment (“COLA”) to pension benefits. That section provides, in
19 relevant part: “[e]ach retirement allowance . . . payable under [the P&F Retirement Plan] .
20 . . together with any increases or decreases . . . *shall* be increased by three percent per
21 annum” (Ex. POA60, italics added.) That section contemplates no exception.
22 Countless City recruiting and retirement benefits documents promised that benefit to
23 Police Officers. (E.g., Ex. POA47.) And, indeed, Police Officers directly pay distinct
24 amounts into the retirement system solely for purposes of funding the COLA. (Ex.
25 POA60, see SJMC 3.44.090.) COLA benefits are recognized vested pension rights.
26 (*Olson v. Cory* (1980) 27 Cal.3d 532, 538-542 [invalidating ballot initiative purporting to
27 divest current and retired judges of COLA benefits because their rights were impaired
28 without providing any comparable new advantages]; *Pasadena Police Officers*

1 *Association v. City of Pasadena* (1983) 147 Cal.App.3d 695, 702 [similar as to police
2 officers].)

3 Section 1510-A, however, gives the City the unfettered right to deny COLAs.
4 First, upon a mere unilateral declaration of “fiscal and service level emergency” by the
5 City Council, the City may “temporarily suspend[]” COLAs to retirees (defined as
6 “current and future retirees employed as of the effective date of this Act”) for up to five
7 years. Measure B does not define a “fiscal and service level emergency” or even require
8 that the City Council’s suspension of COLAs be “reasonable” under the circumstances or
9 reasonably related to a declared emergency. It does not even require that the time period
10 during which COLAs are suspended have any nexus to the declared emergency. Second,
11 any “temporarily suspended” COLA increases are automatically forfeited because
12 Measure B directs that COLAs “shall” only be restored “prospectively” and even then
13 only “in whole or in part.” (*Id.*) Measure B provides no way for retirees to obtain past
14 COLAs to which they are entitled, nor does it provide a comparable advantage for the loss
15 of this protected right. Third, Section 1510-A caps “restore[d]” COLA increases at 3%
16 for current retirees and non-VEP employees, and 1.5% for VEP employees without
17 addressing officers’ entitlement to *past* COLAs. Thus, Measure B substantially impairs
18 Police Officers’ vested pension rights in COLAs.

19 Section 1510-A also violates the Contracts Clause by allowing the City
20 Council to withhold COLA benefits on the declaration of “fiscal emergency.” That is
21 insufficient under *Sonoma County Organization of Public Employees v. County of*
22 *Sonoma* (1979) 23 Cal.3d 296, 310, because when “government is attempting to modify
23 governmental financial obligations” the City’s actions are subjected to heightened scrutiny
24 in light of the availability of less drastic measures. *Sonoma County* considered a statute
25 prohibiting payment of COLAs to active employees for one year—less than the five years
26 allowed under Measure B—and found that was an unconstitutional impairment. (*Id.* at pp.
27 313-317.) Section 1510-A fails the *Sonoma* test because of the degree of impairment—
28 total *forfeiture* of up to *five years* of retiree COLA benefits—and the fact that

1 “government is attempting to modify governmental financial obligations.” That is, even if
2 the City declares a fiscal crisis, it must *further* demonstrate that suspending and then
3 eliminating COLA benefits is “a reasonable [and necessary] measure” directed at
4 resolving that crisis (*id.* at p. 312). Measure B has no such requirements and is thus
5 invalid on its face.

6 **D. Section 1511-A Violates Police Officers’ Vested Rights By**
7 **Eliminating the SRBR**

8 This Court already ruled that, as a matter of law, “the plain language of the
9 [SJMC] makes [SRBR] distributions mandatory” for the P&F Retirement Plan and thus
10 they are a vested right. (Ex. POA51 [MSA Order at 6:16]; Ex. POA49 [SJMC 3.36.580,
11 subd. D.2 (“the board *shall* make an annual distribution from the annual SRBR”)
12 (emphases added)].) It further ruled that “[i]f there was an intent that SRBR cease
13 distributions in the face of unfunded liability, it is not apparent from the face of the
14 Charter or the [SJMC].) (*Id.* at 6:23-25.)

15 Indeed, SJMC 3.36.580 created Police Officers’ vested right to the SRBR,
16 which provides retirees a supplemental check when certain investment goals are exceeded.
17 Section 3.36.580 establishes a funding mechanism (Ex. POA49 [SJMC 3.36.580 at subd.
18 B]), sets the only conditions for distribution or transfer of SRBR funds (*id.* at subd. C-D)
19 and mandates that the *Retirement Board* “shall” distribute funds to eligible retirees on a
20 yearly basis when those investment goals are exceeded (*id.*, subd. D.2 [“the *board* shall
21 make an annual distribution from the annual SRBR”] [italics added].) Specifically, SRBR
22 benefits are funded from earnings from the SRBR fund and “excess earnings” from the
23 P&F Retirement Plan. (*Id.* [SJMC 3.36.580.B].) The SRBR applies only to members
24 who were receiving retirement benefits as of June 2001. (*Id.* at subd. D.3.) There is no
25 time limitation or express reservation of rights to modify the SRBR in the SJMC. (*Id.*
26 [SJMC 3.36.580, subd. E.1 and B.2-B.3].) The SRBR is unequivocally a vested right.
27 (*Id.* [SJMC 3.36.580]; see *Teachers Retirement Board v. Genest* (2007) 154 Cal.App.4th
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1 1012, 1029-1030 [statute created vested right to continuous annual transfer from general
2 fund to supplemental fund].)

3 Despite this vested right, Section 1511-A unilaterally abolished the SRBR:
4 “The [SRBR] *shall* be discontinued, and the assets returned to the appropriate retirement
5 trust fund. Any supplemental payments to retirees in addition to the benefits authorized
6 [under Measure B] shall not be funded from plan assets.” (Exs. POA58; POA62.)

7 The City may argue that transfer of SRBR funds to the P&F Retirement Plan is
8 a comparable new advantage. Not so. Although Section 1511-A directs that SRBR funds
9 be returned to the retirement trust fund, it prohibits the use of such funds to pay for any
10 supplemental benefits. Moreover, the transfer to the retirement trust fund is not a
11 comparable new advantage because Police Officers already participate in the retirement
12 fund with their contributions. (See *Eu, supra*, 54 Cal.3d at 530 [ballot initiative requiring
13 “transfer or redirection of pension funds to federal Social Security system” was not a
14 “comparable new advantage” because “every legislator already possessed the right to join
15 the federal Social Security system”].) The only benefit of the transfer of the SRBR funds
16 is to reduce retirement costs for the City at the expenses of plan members.

17 **E. Section 1512-A Violates Police Officers’ Vested Rights to the “Lowest**
18 **Cost” Retirement Healthcare Plan Available to Active Officers**

19 Upon retirement, Police Officers have an implied vested right¹⁴ to payment for
20 the “lowest cost” healthcare plan available to active Police Officers. In 1984, the City
21 extended the availability of healthcare benefits to retired Police Officers. (Ex. POA6
22 [Ordinance 21686].) Retired Police Officers thus paid a premium “in the same amount as
23 is currently paid by an employee of the City *in the classification from which the member*
24 *retired* or which the member held at the time of death.” (*Id.* § 5 [former SJMC 3.36.1930])

25 ¹⁴ *REAOC* recognized that implied contracts give rise to vested pension rights: “The terms
26 of an express contract are stated in words. The existence and terms of an implied contract
27 are manifested by conduct. The distinction reflects *no difference in legal effect* but merely
28 in the mode of manifesting assent. Accordingly, a contract implied in fact consists of
obligations arising from a mutual agreement and intent to promise where the agreement
and promise have not been expressed in words.” (52 Cal.4th at 1178 [italics added;
internal citations and quotations omitted].)

1 [italics added].) Retirement Handbooks provided to employees in 1995 and 1997
2 represented that “You and your survivors will be required to pay a portion of the
3 premiums equal to the amount paid by City employees in the same position you held at
4 the time of your retirement.” (Exs. POA9 and POA10 [1995 and 1997 P&F Retirement
5 Plan Handbooks, italics added].)

6 The City amended SJMC 3.36.1930 in 1998 to implement an arbitration
7 decision whereby the P&F Retirement Plan would pay the cost of healthcare premiums.
8 (Ex. POA13 [Ordinance 25615].) Specifically, the P&F Retirement Plan would pay the
9 premium for the “lowest cost medical plan” which was defined as “the lowest monthly
10 premium of all eligible medical plans then in effect, determined as of the time the
11 premium is due and owing.” (*Id.* § 3 [SJMC 3.36.1930.D].) Although the SJMC was
12 ambiguous whether the premium paid was with reference to Police Officers or all City
13 employees (*see id.*), since then the P&F Retirement Plan told retired Police Officers at
14 various times they would receive “the same” healthcare benefits as active employees or
15 that it would pay “100% of the lowest priced medical insurance plan available to an active
16 police and fire employee.” (Exs. POA48 [P&F Retirement Plan Annual Financial
17 Reports, FY 2007-11]; POA56 at ¶3 [Fehr MSA Decl.]; POA57 at ¶3 [Salvi MSA Decl.])
18 Indeed, the evidence will show the City has always tied retiree healthcare to what active
19 employees received, and the City has never offered retirees a plan not connected to what
20 active employees are actually in. These facts give rise to an implied vested right to
21 payment of the premium for the “lowest cost” retirement health care plan received by
22 active Police Officers. (*Requa v. Regents of the Univ. of Cal.* (2012) 213 Cal.App.4th 213
23 [retirement plan booklets and publications create implied vested right to continued retiree
24 healthcare].)

25 Section 1512-A detrimentally re-defined “low cost plan” to mean “the medical
26 plan which has the lowest monthly premium available to any active employee in either the
27 Police and Fire Department or Federated City Employees’ Retirement Plan,” i.e., the
28 lowest cost plan **City-wide**. That means that retired officers get the lowest benefit

1 available to non-public safety City employees who, e.g., were unlikely to spend their
2 careers in a position as physically-demanding and dangerous as a Police Officer. The City
3 offered no comparable new benefit.

4 **F. The City Cannot Satisfy Its Burden of Justifying Measure B as**
5 **Constitutionally Reasonable and Necessary**

6 Vested pension rights may only be modified when: (1) the modifications are
7 materially related to keeping the pension system solvent (*i.e.*, they have a “material
8 relation to the theory of a pension system and its successful operation”), and (2) any
9 “disadvantage[s] to employees” are “accompanied by comparable new advantages.”
10 (*Betts, supra*, 21 Cal.3d at p. 864.) The City must satisfy both prongs. (See *id.*) The City
11 has not previously argued or raised any argument that Measure B is necessary to keep the
12 pension system solvent. In any event, “[f]ew reported decisions have . . . found that the
13 balance of economic necessity outweighed the employees’ right to offsetting advantages”
14 and the only such case cited involved a pension system that was “completely insolvent.”
15 (*Wills, supra*, 187 Cal.App.3d at 793.)

16 Measure B fails this constitutionally-mandated standard for numerous reasons.
17 First, the evidence will show Measure B is wholly a cost-saving measure *unrelated* to
18 keeping the Retirement Plan financially solvent. In fact, Measure B’s “Findings” section
19 emphasizes the purported fiscal burdens on the City’s funding of the Retirement Plan, but
20 makes *no finding* that Measure B is necessary to keeping the retirement system sound.
21 (Ex. POA58 [Section 1501-A].) For example:

- 22 • “[T]he voters find and declare that [retirement] benefits must be
23 adjusted . . . [to] protect[] *the City’s viability* and public safety”
24 (*Id.*, italics added.)
- 25 • Measure B is intended to address only the City’s ability to provide
26 “Essential City Services” threatened “by budget cuts caused mainly by
27 the climbing cost of employee benefit programs” including “[t]he
28 employer cost of the City’s retirement plans.” (*Id.*)

- None of the enumerated “Essential City Services” includes providing its employees the retirement benefits they were promised and which they earned. (*Id.* [defining such services only as “police protection; fire protection; street maintenance; libraries; and community centers”].)
- Even though retirement benefits have already been promised to employees and earned by them, Measure B finds that “[t]he City and its residents always intended that [retirement benefits] be fair, reasonable and subject to the City’s ability to pay *without jeopardizing City Services.*” (*Id.*, italics added.)¹⁵

Similarly, the legislative history of Measure B confirms it was about cost-cutting unrelated to keeping the pension system solvent. (See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, (2005) 133 Cal.App.4th 26, 31 [resolutions, government analyses and ballot arguments are sources of legislative history].) The City Council resolution placing Measure B on the ballot made no finding that it was necessary to keep the retirement system solvent. (Ex. POA58.) Nor did the City Clerk’s analysis that accompanied Measure B on the ballot. (Ex. POA54.) Even the ballot measure arguments presented to the voters in favor of Measure B emphasized City costs rather than the need for Measure B to keep the Retirement Plan solvent. (See, e.g., Ex. POA54 [“Argument in Favor of Measure B [/p] Annual retirement costs skyrocketed from \$73 million to \$245 million over the last decade, *causing service cuts* throughout the city Retirement costs consume more than 20% of the general fund and are projected by independent actuaries to increase for years”], italics added.) (See also Ex. POA54 [“Rebuttal to Argument Against Measure B” asserting that “Measure B follows California law,” but no where stating that Measure B to keep the Retirement Plan solvent.]

And, as the independent the California State Auditor found, the City’s retirement cost projections were “unsupported and likely overstated.” (Ex. POA44, p. 1 [the City “referred to a projection that the city’s annual retirement costs could increase to

¹⁵ The City has argued that Measure B’s “Findings” section contains language regarding the City’s ability to fund the retirement system, but nowhere does that language actually state that Measure B is *necessary* to preserve the solvency of the retirement system itself. (See *id.*)

1 \$650 million by fiscal year 2015–16, a projection that our actuarial consultant determined
2 was unsupported and likely overstated”].)

3 Perhaps more importantly, Measure B gives Police Officers not one new
4 advantage in exchange for taking away their vested pension rights. As outlined above, it
5 does not give employees a more solvent Retirement Plan. More specifically, employees
6 receive no new benefit to compensate them for the substantial impairments of their
7 existing pension rights. Measure B’s legislative history, by contrast, demonstrates that it
8 is *the City* alone that obtains any new benefits, at the cost of employees’ earned and
9 vested pension rights.

10 Measure B’s is unreasonable on its face and as applied because it effectively
11 eliminates the benefits Police Officers counted on in accepting employment with the City
12 and which they reasonably expected to have. For example, reducing officers’ salary to
13 pay for pension UAAL not only reduces their contractual salaries but it also does so to pay
14 for UAAL cost that the City obligated itself to pay. As to disability retirement and
15 retirement healthcare, officers expected to rely on these programs when they accepted
16 their positions with the City, especially given that they risked great person injury every
17 day as they protected the City of San Jose. The same is true as to pension, COLA and
18 SRBR benefits, particularly because Police Officers specifically funded these two benefits
19 through their contributions.

20 **II. NUMEROUS SECTIONS OF MEASURE B VIOLATE SJPOA’S COLLECTIVE** 21 **BARGAINING AGREEMENT**

22 Sections 1506-A, 1507-A, 1512-A, and 1514-A additionally violate SJPOA’s
23 memorandum of understanding with the City. The parties’ MOA is a valid and binding
24 contract, it is undisputed Police Officers have performed under it, Measure B breaches the
25 MOA (as outlined below), causing Police Officers damages. (See *Careau & Co. v. Sec.*
26 *Pac. Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388 [breach of contract
27 elements: “(1) [a] contract, (2) plaintiff’s performance or excuse for nonperformance, (3)
28 defendant’s breach, and (4) the resulting damages to plaintiff”].)

1 **A. Sections 1506-A, 1507-A, and 1514-A Unilaterally Reduce the MOA's**
2 **Contractually-Agreed Salaries**

3 Police Officers' salaries are set by the parties' contract, according to individual
4 officers' classification. (See Ex. POA30 [MOA]) Sections 1506-A, 1507-A, and 1514-A
5 all unilaterally reduce those salaries by as much as 16% in order to pay UAAL; the former
6 two sections do so directly, and (as outlined in Part I.A, *supra*), the latter does so
7 indirectly if the VEP is deemed unlawful. That breaches the parties' contract, resulting in
8 damages to Police Officers in the amount of 4-16% of their salary (based on the rate of the
9 City's implementation).

10 **B. Section 1512-A Violates Contribution Rate Caps and Meet-and-**
11 **Confer Obligations in the MOA**

12 The MOA also caps Police Officers' contributions for retiree healthcare. The
13 MOA provides that such contributions are made by the City and Police Officers on a 1:1
14 ratio. (Ex. POA30.) More importantly, the MOA expressly caps any increase in
15 contribution rates for Police Officers at 1.25% per year. (Ex. POA30 [2011-2013 MOA,
16 Section 50.1].) The MOA further provides that employees shall not pay more than 10%
17 of their pensionable salary to fund retiree healthcare. (*Id.* [Section 50.4].) As of July 1,
18 2013, SJPOA members already pay 9.51% of their pensionable pay toward retiree
19 healthcare costs. (Ex. POA40 [4/5/12 P&F Retirement Plan Resolution No. 3761];
20 POA45 [3/7/13 P&F Retirement Plan Resolution No. 3800].)

21 Section 1512-A, however, mandates employees "contribute a minimum of 50%
22 of the cost of retiree healthcare, including both normal costs and unfunded liabilities." If
23 Measure B Section 1512-A is applied to Police Officers, their contributions can exceed
24 the yearly and overall contractual caps in the MOA, and Police Officers would not be able
25 to invoke the meet and confer provisions of the MOA that the parties negotiated to
26 determine how to pay for any contributions above 10%. That breach will damage Officers
27 by requiring them to pay more than they agreed to in their MOA.
28

1 **III. SECTION 1513-A UNLAWFULLY DIVIDES THE P&F RETIREMENT BOARD’S**
2 **FIDUCIARY LOYALTY TO BENEFICIARIES**

3 The P&F Retirement Board’s duties are to retirement plan beneficiaries, i.e.,
4 current and retired Police Officers, under trust law principles enshrined in the California
5 Constitution. The California Pension Protection Act (the “Act”) gives constitutional force
6 to the fiduciary duties of retirement boards to their beneficiaries:

7 (a) The retirement board of a public pension or retirement system
8 shall have the sole and exclusive fiduciary responsibility over the
9 assets of the public pension or retirement system. *The retirement*
 board shall also have sole and exclusive responsibility to administer
 the system in a manner that will assure prompt delivery of benefits
 and related services to the participants and their beneficiaries....

10 (b) The members of the retirement board of a public pension or
11 retirement system *shall* discharge their duties with respect to the
12 system *solely in the interest of, and for the exclusive purposes of*
13 *providing benefits to, participants and their beneficiaries,*
14 minimizing employer contributions thereto, and defraying
15 reasonable expenses of administering the system. *A retirement*
16 *board’s duty to its participants and their beneficiaries shall take*
17 *precedence over any other duty.*

18 ...

19 (e) The retirement board of a public pension or retirement system,
20 *consistent with the exclusive fiduciary responsibilities vested in it,*
21 *shall have the sole and exclusive power to provide for actuarial*
22 *services* in order to assure the competency of the assets of the public
23 pension or retirement system.”

24 (Cal. Const. art. XVI; § 17 [italics added].) The Act was specifically enacted to prevent
25 “meddling” with pension funds in times of perceived fiscal distress. (*State ex rel. Pension*
26 *Obligation Bond Committee v. All Persons Interested in Matter of Validity of Cal. Pension*
27 *Obligation Bonds* (2007) 152 Cal.App.4th 1386, 1392 [“Politicians have undermined the
28 dignity and security of all citizens who depend on pension benefits ... by repeatedly
 raiding their pension funds.... [¶] ... To protect the financial security of retired
 Californians, politicians must be prevented from meddling in or looting pension funds”];
 see also *Board of Retirement v. Sup.Ct.* (2002) 101 Cal.App.4th 1062, 1070 [reversing
 trial court determination that would “erode the retirement board’s sole and exclusive
 fiduciary responsibility” to beneficiaries].)

1 Section 1513-A compromises these constitutionally-based duties by requiring
2 the Retirement Board (1) to administer retirement plans so they “minimize *any* risk to *the*
3 *City and its residents*,” and (2) to equally “ensure fair and equitable treatment for current
4 and future plan members *and taxpayers* with respect to the costs of the plans.” (Section
5 1513-A(a), (c)(2), italics added].) Requiring the Retirement Board to divide its fiduciary
6 duties between beneficiaries and the City/taxpayers violates Article XVI, section 17,
7 because the Board is constitutionally-required to discharge its duties “for the exclusive
8 purposes of providing benefits to, participants and their beneficiaries” and its paramount
9 duty is to beneficiaries. (Cal. Const. art. XVI, § 17(b).) Additionally, consistent with its
10 fiduciary duties to beneficiaries, the Board has “the sole and exclusive responsibility to
11 administer the system” and “the sole and exclusive power to provide for actuarial
12 services” (*id.*, subd. (a), (e)), meaning that as such Section 1513-A(c) cannot, as it directs,
13 dictate “the actuarial assumptions for the plan[]” or their “objectives.” (See *Westly v.*
14 *CALPERS* (2003) 105 Cal.App.4th 1095, 1110 [“the ‘plenary authority’ that is granted
15 over the ‘administration of the system’ goes to the management of the assets and their
16 delivery to members and beneficiaries of the system”].)

17 The City will likely argue ordinances enacted months *after* Measure B became
18 law is “evidence” that Section 1513-A can be reconciled with the Pension Protection Act.
19 But no such reconciliation is possible because Measure B purports to place the City and
20 its taxpayers on equal footing with beneficiaries, to whom the P&F Retirement Board owe
21 fiduciary duties above all others. *City of Sacramento v. Public Employees Retirement*
22 *System* (1991) 229 CalApp.3d 1470, 1493 held that “even assuming [the Act] creates a
23 duty to minimize employer contributions, it cannot be construed to require [a retirement
24 board] to manage the retirement system in a way which would favor an employer over the
25 beneficiaries to whom it owes a fiduciary duty.” That was because:

26 a trustee's primary duty of loyalty is to the beneficiaries of the trust.
27 ... The trustee must not be guided by the interest of *any third*
28 *person*. This unwavering duty of complete loyalty to the
 beneficiary of the trust must be *to the exclusion of the interest of all*
 other parties. Under the rule against divided loyalties, a fiduciary

1 cannot contend that although he had conflicting interests, he served
2 his masters equally well or that his primary loyalty was not
weakened by the pull of his secondary one.

3 (*Id.* at 1494 [citations and quotations omitted].) It thus concluded that “[a]ny duty [a
4 retirement board] has to minimize employer contributions may not take precedence over
5 its duty to the beneficiaries of the system.” (*Id.*) Thus, because the P&F Retirement
6 Board has no lawful discretion to act in contravention of its constitutional duties under the
7 Act, Measure B cannot be reconciled with the Act, and is invalid.

8 **IV. THE POISON PILL IN SECTION 1514-A VIOLATES THE RIGHT TO PETITION**
9 **BECAUSE IT PUNISHES POLICE OFFICERS IF THEIR LAWSUIT IS SUCCESSFUL**

10 To prevail on its Freedom of Speech/Right to Petition claim, SJPOA must
11 prove that Measure B burdened its members’ constitutional right to sue the City. The
12 California Constitution protects the right to “petition government for redress of
13 grievances.” (Cal. Const., art. I, § 3.) “The right to petition encompasses the right to
14 sue.” (*Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 52 [“the right to sue ...
15 is the alternative of force. In an organized society it is the right conservative of all other
16 rights, and lies at the foundation of orderly government”; noting “the California Supreme
17 Court [has] concluded that a suit ... against the government occupies a preferred status”].)
18 “[A]ny impairment of the right to petition, including any penalty exacted after the fact
19 must be narrowly drawn.” (*Id.* at p. 57.) As the California Supreme Court held in a
related context:

20 Few liberties in America have been more zealously guarded than
21 the right to protect one’s property in a court of law. This nation has
22 long realized that none of our freedoms would be secure if any
23 person could be deprived of his possessions without an opportunity
24 to defend them In a variety of contexts, the right of access to
the courts has been reaffirmed and strengthened throughout our
200-year history.

25 (*Payne v. Superior Court* (1976) 17 Cal.3d 908, 911 [imposing cost of administrative law
26 judge on teachers challenging suspension or termination unconstitutionally burdens
27 rights].) Indeed, our Supreme Court has expressly held that “[t]he imposition of a cost or
28 risk upon the exercise of the right to a hearing is impermissible if it has no other purpose

1 or effect than to chill the assertion of constitutional rights by penalizing those who choose
2 to exercise them.” (*California Teachers Assn. v. California* (“CTA”) (1999) 20 Cal.4th
3 327, 338 [italics added].)

4 On its face Section 1514-A’s “poison pill” chills legal challenges to Measure B
5 because it mandates an automatic salary deduction of up to 16% if Section 1506-A(b) “is
6 determined to be illegal, invalid or unenforceable.” Thus, at a practical level, if SJPOA is
7 successful in its lawsuit to protect its members’ pension rights and Section 1506-A is
8 declared unlawful, Section 1514-A disregards that illegality and steps in to compel a 16%
9 salary reduction. That is untenable because it threatens an unlawful reduction of contract-
10 based salaries to dissuade successful legal challenges. And while Measure B makes that
11 liability is immediate, our Supreme Court has counseled that even *potential* liability that
12 chills the right to petition is unlawful. (*PG&E v. Bear Sterns & Co.* (1990) 50 Cal.3d
13 1118, 1123 [refusing to recognize tort cause of action for inducing party to seek judicial
14 interpretation of contract because that would be “a pernicious barrier to free access to the
15 courts”].)

16 That Measure B involves Police Officers’ pensions and salaries does not mean
17 this case is of private rather than public concern. SJPOA’s lawsuit involves a public
18 concern regarding the City’s allocation of city funds and the City’s claims of insufficient
19 funds to pay earned pension rights. (See Ex. POA42 [SJPOA FAC].) Lawsuits
20 challenging government’s use of public funds involve public matters. (See *McKinley v.*
21 *City of Eloy* (9th Cir. 1983) 705 F.2d 1110, 1114-1115 [police officer’s criticism that city
22 council refused to pay salary increase “substantially” met public interest requirement;
23 “compensation levels undoubtedly affect the ability of the city to attract and retain
24 qualified police personnel, and the competency of the police force is surely a matter of
25 great public concern”]; *Connick v. Myers* (1982) 461 U.S. 138 and *Pickering v. Board of*
26 *Education* (1968) 391 U.S. 563, 571-572 [public employee’s criticism of “allocation of
27 school funds” and of government employer’s methods of asking taxpayers for additional
28 funds are matters of public interest deserving constitutional protection].)

1 Such court-filed lawsuits “communicate to the public” and “advance a political
2 or social point of view beyond the employment context.” (*Borough of Duryea v.*
3 *Guarnieri* (2011) 131 S. Ct. 2488, 2501.) *Guarnieri* acknowledged the salutary effects of
4 lawsuits brought by public employees and emphasized these should not be unduly
5 burdened because “these and other benefits may not accrue if one class of knowledgeable
6 and motivated citizens is prevented from engaging in petitioning activity.” (*Id.* at 2500.)

7 Measure B on its face directly and substantially burdens Police Officers’ right
8 to petition and is insufficiently tailored.¹⁶ Section 1514-A’s poison pill directly and
9 impermissibly impacts SJPOA members’ ability to challenge Measure B in court because
10 it punishes them with a 16% salary reduction if they are successful. That is, Measure B is
11 structured so that even if a union sues to invalidate Section 1506-A, a union would still
12 lose by operation of Section 1514-A. Further, the poison pill is entirely “punitive”
13 because there is no requirement the salary reductions be used to pay for unfunded
14 actuarial liability (the stated rationale for the reductions) and thus the reductions appear to
15 be salary reductions for the sake of reductions.

16 Section 1514-A serves no legitimate purpose—let alone a compelling
17 government interest—because it is purely punitive and has no nexus to Measure B’s stated
18 rationales. The California Supreme Court has held in an analogous context that such
19 burdens on the right to a hearing are “impermissible” and that a “[statute] must have a real
20 and substantial relation to a proper legislative goal.” (*CTA, supra*, 20 Cal.4th at p. 338;
21 *Wolfgram, supra*, 53 Cal.App.4th at p. 57.) For that reason, that Section 1514-A is
22 misleadingly titled a “Savings” clause does not cure the illegality because, regardless of
23 its name, its effect is to chill any legal challenges. Similarly, regardless of Measure B’s

24
25 ¹⁶ To the extent Section 1514-A has “real and appreciable impact on, or a significant
26 interference with the exercise of the fundamental right,” then “strict scrutiny” applies.
27 (*Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 47; *Browne v.*
28 *Russell* (1994) 27 Cal.App.4th 1116, 1122 [in strict scrutiny ordinance “can survive ...
only if the government shows that it advances a compelling State interest and is narrowly
tailored to serve that interest”].) But “[w]hen the regulation merely has an incidental
effect on exercise of protected rights,” rational basis review applies. (*Id.*) Regardless of
the level of constitutional scrutiny applied, Section 1514-A fails.

1 stated “Findings,” the poison pill does not further them. Accordingly, the burden on
2 SJPOA members’ right to petition is outweighed by the City’s purported interest in the
3 poison pill.¹⁷

4 **V. SECTION 1515-A ARROGATES JUDICIAL POWERS TO THE CITY AND VIOLATES**
5 **THE SEPARATION OF POWERS DOCTRINE**

6 “[T]he fundamental separation of powers doctrine embodied in article III,
7 section 3 of the California Constitution forbids ... legislative usurpation of traditional
8 judicial authority.” (*Mandel v. Myers* (1981) 29 Cal.3d 531, 547.) “Our Constitution
9 assigns the resolution of ... controversies to the judicial branch of government (Cal.
10 Const., art. VI, § 1) and provides the Legislature with no authority to set itself above the
11 judiciary by discarding the outcome or readjudicating the merits of particular judicial
12 proceedings.” (*Id.*)

13 Section 1515-A violates the Separation of Powers doctrine because it allows
14 the City Council to arrogate to itself the judicial function by authorizing that legislative
15 body to decide the effect of a judicial court’s decree when portions of Measure B are
16 declared unlawful. First, subd. (a) provides that “[i]f any portion of this Act is held
17 invalid as to any person or circumstance, such invalidity shall not affect any application of
18 this Act which can be given effect.” Subdivision (a) thus purports to declare the effect of
19 a court ruling finding “any” portion of Measure B is unlawful; that is, it declares that
20 Measure B remains valid, e.g., as to current employees even if unlawful as applied to
21 retirees, and as to future employees even if unlawful as to current employees—regardless
22 of whether the challenge is facial or as-applied. Second, subd. (b) provides that “[i]f any
23 ordinance adopted pursuant to this Act” is declared unlawful then “the matter shall be
24 referred to the City Council for determination as to *whether to amend* the ordinance

25 ¹⁷ The fact that this lawsuit has been filed and prosecuted notwithstanding Measure B’s
26 attempt to chill it does not cure the illegality: “An individual’s constitutional right of
27 access to the courts cannot be impaired, either directly or indirectly, by threatening or
28 harassing an individual in retaliation for filing lawsuits. It is not necessary that the
individual succumb entirely or even partially to the threat as long as the threat or
retaliatory act was intended to limit the individual’s right of access.” (*CTA, supra*, 20
Cal.4th at p. 339.)

1 consistent with the judgment, or *whether to determine the section severable and*
2 *ineffective* if such ordinance is found to be invalid, unconstitutional or otherwise
3 unenforceable.” (italics added.) That is, subdivision (b) gives the City authority to
4 decide severability after the fact, even though that determination is entrusted to the courts.

5 These results are untenable under our system of laws:

6 If the Legislature in such a case were empowered to reexamine the
7 merits of litigation and to ignore a particular judgment whenever it
8 so chose, the myriad safeguards of the judicial process would come
9 to naught and *one party to a lawsuit would in effect become both*
10 *litigant and judge*. In our view it is difficult to imagine a clearer
11 example of legislative usurpation of judicial authority.

12 (*Mandel, supra*, 29 Cal.3d at p. 549 [italics added]; *ibid.* [any other conclusion would
13 “completely deprive court judgments of the respect and deference which the Constitution
14 contemplates each branch of government would accord to final actions within the
15 jurisdiction of a coequal branch, and would repose in the Legislature a combination of
16 powers that the constitutional draftsmen specifically intended to forestall”].) Accordingly,
17 Section 1515-A violates the Separation of Powers.

18 **VI. THE CITY IS NOT ENTITLED TO JUDGMENT ON ITS FEDERAL CROSS-CLAIMS**
19 **BECAUSE FEDERAL LAW LOOKS TO STATE LAW TO DETERMINE PROPERTY**
20 **RIGHTS**

21 This Court has discretion to deny declaratory relief where it is “not necessary
22 or proper ... under all the circumstances.” (*Meyer v. Sprint Spectrum* (2009) 45 Cal.4th
23 634, 647, quoting Code Civ. Proc., § 1061.) Indeed, declaratory relief must “serve some
24 practical end” and when it “would have little practical effect in terms of altering parties’
25 behavior” a court is entitled to “deny declaratory relief.” (*Id.* at p. 647-648.) Like the
26 plaintiffs in *Meyer*, the City here “[has] not with any particularity” argued that resolution
27 of its federal cross-claims would “have any practical consequences” (*id.*), that is, it has not
28 argued that whether Measure B violates Police Officers’ vested rights will be different
under federal law.

The City’s federal cross-claims essentially parrots SJPOA’s state law vested
rights claims. (Cross-Complaint ¶ 2 [“This action seeks declaratory relief under the

1 federal constitutional counterparts of the state law constitutional claims brought by
2 [plaintiffs]”; *id.* ¶ 9 [“This is solely an action ... to confirm the legality of Measure B”).
3 For that reason, this Court need not rule on the City’s federal claims, particularly because
4 it would make no difference to the underlying judgment, i.e., if Measure B violates the
5 California Constitution, it does not matter whether or not it additionally violates the
6 federal constitution because the City would be barred from applying it to Police Officers.
7 (*Claremont Improvement Club, Inc. v. Buckingham* (1948) 89 Cal.App.2d 32, 33 [“If [the
8 underlying measure] is unenforceable the whole purpose of the [cross-claim] litigation
9 fails”]; see also *California State Electronics Assn. v. Zeos Internat. Ltd.* (1996) 41
10 Cal.App.4th 1270, 1274 [court should avoid constitutional questions where other grounds
11 are available to dispose of the case].)

12 In any event, federal law looks to state law to determine whether a protected
13 property right exists for purposes of the federal Contracts Clause, Takings, and Due
14 Process. (*San Diego Police Officers' Ass'n, supra*, 568 F.3d at p. 737 [Contracts Clause:
15 “federal courts look to state law to determine the existence of a contract”]; *id.* at p. 740
16 [Takings: “In order to state a claim under the Takings Clause, a plaintiff must first
17 establish that he possesses a constitutionally protected property interest”]; *Portman v.*
18 *County of Santa Clara* (9th Cir. 1993) 995 F.2d 898, 904 [“[t]he Due Process Clause does
19 not create substantive rights in property; the property rights are defined by reference to
20 state law”].) Because Measure B deprives Police Officers of state-created property rights,
21 and the City has not argued the vested rights analysis is different under federal law,
22 Measure B also violates the federal constitution.

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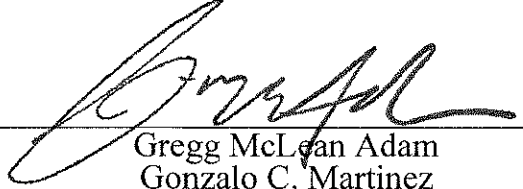
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CONCLUSION

For all these reasons, this Court should enter judgment in favor of SJPOA on its claims and deny the declaratory relief the City requests or, alternatively, deny all the City's federal cross-claims.

Dated: July 8, 2013

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APPENDIX A

Comparison of Changes to Pension and Other Rights Due to "Voluntary Election Program" ("VEP")	
Benefits if Officers Stay in Current Plan	Officers' Pension Benefits Under New VEP
<ul style="list-style-type: none"> • New threatened salary reduction up to 16%, unless select VEP • New cost-sharing ratio and increased pension contributions to pay for up to 50% of pension UAL, unless select VEP • Retain pension benefits formula of: 2.5% of final compensation for each year of service up to 20 years, plus 4% of final compensation for each year of service between 21-30 years up to a cap of 90% of final compensation • Retain "final compensation" definition the highest average monthly compensation of the member during any period of twelve consecutive months of service • Retain eligibility for retirement benefits at age 50 with 25 years of service, or at age 55 with 20 years of service, or at any age following 30 years of service • Retain right to annual 3% COLA 	<ul style="list-style-type: none"> • Retain current salary, only when select VEP • Retain right not to pay UAL, only when select VEP • New pension benefits formula of: 2% of final compensation for each year of prospective service, up to a cap of 90% of final compensation • New "final compensation" definition as the average annual pensionable pay of the highest three consecutive years of service • New eligibility for retirement benefits only at age 57, including the eligibility to retire after 30 years service but cannot retire earlier than age 50 • New cap on COLAs at 1.5% per fiscal year

(See Exs. POA49 [SJMC], POA30 [MOA], POA58 [Measure B].)

1 *San Jose POA v. City of San Jose, et al.,*
2 Santa Clara County Superior Court, No. 1-12-CV-225926
(and Consolidated Actions 1-12-CV-225928, 1-12-CV-226570, 1-12-CV-226574,
3 1-12-CV-227864, and No. 1-12-CV-233660)

4 **PROOF OF ELECTRONIC SERVICE**

5 I declare that I am employed in the County of San Francisco, California. I am
6 over the age of eighteen years and not a party to the within cause; my business address is
44 Montgomery Street, Suite 400, San Francisco, CA 94104. On July 8, 2013, I served
7 the enclosed:

8 **PLAINTIFF AND CROSS-DEFENDANT SAN JOSE POLICE OFFICERS' ASSOCIATION'S**
9 **TRIAL BRIEF**

10 by electronic service. Based upon a court order or an agreement of the parties to accept
11 service by electronic transmission, I caused the documents to be sent to the persons at the
electronic notification addresses listed below. I did not receive, within a reasonable time
12 after the transmission, any electronic message or other indication that the transmission
was unsuccessful.

13 Arthur A. Hartinger, Esq. Linda M. Ross, Esq. Jennifer L. Nock, Esq. 14 Michael C. Hughes, Esq. Meyers, Nave, Riback, Silver & Wilson 15 555 12th Street, Suite 1500 Oakland, CA 94607 16 Phone: (510) 808-2000 Fax: (510) 444-1108 17 Email: ahartinger@meyersnave.com lross@meyersnave.com 18 jnock@meyersnave.com mhughes@meyersnave.com 19	20
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20	21 <i>Counsel for Defendants</i> <i>City of San Jose (No. 1-12-CV-225926)</i> 22 <i>City of San Jose and Debra Figone</i> <i>(Nos. 1-12-CV-225928;</i> <i>1-12-CV-226570; 1-12-CV-226574;</i> <i>1-12-CV-227864)</i> 23 24 25 26 27 28
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5	Fax: (415) 391-8269	
6	Email: hleiderman@reedsmith.com	<i>Necessary Party in Interest The Board of Administration for the 1975 Federated City Employees' Retirement Plan (Nos. 1-12-CV-226570; 1-12-CV-226574)</i>
7		
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9		<i>Necessary Party in Interest The Board of Administration for the Federated City Employees Retirement Plan (No. 1-12-CV-227864)</i>
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12 I declare under penalty of perjury that the foregoing is true and correct, and
13 that this declaration was executed on July 8, 2013, at San Francisco, California.

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Joan Gonsalves